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No. 87-1652

In The

Supreme Court of the United States

October Term, 1987

GEORGE E. ADAM,

vs. *Petitioner,*

KERR-McGEE CHEMICAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Court precluded from reviewing an allegedly erroneous jury instruction where the Petitioner failed to object to the instruction at trial as required by Rule 51 of the Federal Rules of Civil Procedure?

2. Is a jury instruction in an age discrimination case erroneous because, in the *liability* phase of the trial, it does not place the burden of proof on the defendant to prove that it would have discharged plaintiff regardless of plaintiff's age?

LIST OF PARTIES

Pursuant to Supreme Court Rule 28.1, respondent herewith submits the following list of its parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation:

1. Kerr-McGee Corporation;
2. White Shoal Pipeline Corporation;
3. Brewster Phosphates;
4. Ace Limited (Offshore);
5. Basic Management, Inc.;
6. Bikita Minerals (Foreign);
7. Corporate Officers & Directors Assurance Holding (Foreign);
8. Downtown Airpark, Inc.;
9. Oil Casualty Insurance Ltd. (Foreign); and
10. Oil Insurance Limited (Foreign).

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Respondent, Kerr-McGee Chemical Corporation, respectfully requests that this Court deny George E. Adam's Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on February 9, 1988.

JURISDICTION

The jurisdictional statement in the Petition is correct. Respondent does not question the jurisdiction of this Court.

STATEMENT OF THE CASE

George E. Adam ("Adam") was the Facilities Manager at Kerr-McGee Chemical Corporation's ("Kerr-McGee") Hamilton, Mississippi facility. (Petition, App. 3 at p. 19a). Kerr-McGee's bleak financial outlook in 1982 caused it to undertake a reduction in its workforce. (*Id.*). The reduction in force was implemented pursuant to a plan known as the Effective Manning Program, which required the elimination of unnecessary positions, regardless of who held the position or whether the position was in a profitable or non-profitable area of the company. (*Id.*). Because of recently completed corporate restructuring, Adam's job as Facilities Manager was an obvious choice for elimination. (*Id.*).

Adam was informed about the decision to eliminate the Facilities Manager position on September 27, 1982. (*Id.*). Adam's job responsibilities as Facilities Manager were divided among two other managers who had previously reported to him. (*Id.* at 19a-20a). These managers were approximately forty years of age. (*Id.* at 20a). Kerr-McGee did not dispute the fact that Adam had been an excellent employee. In fact, following the elimination of his job, Kerr-McGee negotiated a lucrative consulting agreement with Adam under which he performed for several months. Adam initiated this action only after he

could not negotiate a long-term consulting agreement with Kerr-McGee. (*Id.*).

On November 24, 1986, Adam's case was presented to a jury. Following a three day trial, it took the jury 42 minutes to determine that Kerr-McGee had not intentionally discriminated against Adam because of his age. (*Id.* at 21a). Adam appealed this adverse finding to the United States Court of Appeals for the Fifth Circuit, which upheld the verdict by judgment entered February 9, 1988.

REASONS FOR DENYING THE PETITION

Petitioner urges this Court to review an allegedly erroneous jury instruction given by the district court at the trial of this case. The jury instruction about which Petitioner complains reads as follows:

> The Court instructs the jury that even if you find that age was merely one of several factors that led to the elimination of the Facilities Manager position, that does not mean that the defendant's decision was unlawful. If the evidence shows that the Facilities Manager position would have been eliminated regardless of plaintiff's age, then you must find for the defendant. In other words, the plaintiff must prove that age was a motivating or determinative factor in the elimination of the Facilities Manager Position.

(Petition at p. 5). Petitioner contends this instruction is erroneous because the case was a "mixed" or "dual" motive case and, consequently, the instruction did not properly shift the burden of proof to the defendant to

prove that plaintiff's position would have been eliminated regardless of his age.

The Court should not grant the Petition for a Writ of Certiorari for the following reasons: (1) Petitioner did not object to the allocation of the burden of proof as required by Rule 51 of the Federal Rules of Civil Procedure and did not give the district court or the Respondent notice of a defect in the instruction or the opportunity to correct it; and (2) the instant action is an inappropriate case for the Court to address the issue raised by the Petitioner.

1. Petitioner Failed to Comply with Rule 51.

Petitioner seeks the Court's review of an allegedly erroneous jury instruction. (Petition, p.i). Petitioner advanced the same argument before the Court of Appeals. (Petition, App. 3, p. 23a). Respondent urged the Court of Appeals to reject Petitioner's complaint about the jury instruction, in part, because Petitioner did not object to the instruction before the district court as required by Rule 51 of the Federal Rules of Civil Procedure. (*Id.*). The Court of Appeals specifically held that "under Rule 51 of the Federal Rules of Civil Procedure, there was no timely objection, and Adam cannot complain about this point on appeal." (*Id.* at 24a).

Rule 51 states that "no party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed.R.Civ.P. 51. This is a simple and just rule for both the litigants and the court. Timely objections provide notice to the trial court and opposing counsel of a potential error and give them the

opportunity to make corrections. Thus, the necessity of a retrial may be avoided. *See* Wright and Miller, 9 *Federal Practice and Procedure* § 2551 (West 1971). Indeed, the Court of Appeals in the instant case found that "Adam did not properly object prior to the jury's deliberation in order to give the court the opportunity to correct an alleged error." (Petition, App. 3, p. 24a).[1] In a recent opinion, this Court refused to decide a case on the grounds that the Petitioner had not met Rule 51 requirements during the trial. *See City of Springfield v. Kibbe*, ___ U.S. ___, 107 S.Ct. 1114, 94 L.Ed.2d 293 (1987). This Court has also held that non-jurisdictional defects, including the failure to comply with Rule 51 requirements, could preclude the Court's granting a petition for a writ of certiorari where the Rule 51 defect was argued before the appellate court and timely raised in the Respondent's brief in opposition to the petition for a writ of certiorari. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985). Respondent has met the *Tuttle* criteria.

Petitions for a writ of certiorari have been granted in limited instances even though Rule 51 requirements were not technically met. *See City of St. Louis v. Praprotnik*, ___ U.S. ___, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *City of Oklahoma City v. Tuttle, supra*, 471 U.S. at 815-16; *City of*

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[1] Petitioner gives little attention to the Court of Appeals' holding with respect to Rule 51. Petitioner obliquely states that an objection was made, albeit unspecific, as if his failure to object properly was a mere technicality. (Petition, p. 3 n.1). The Court of Appeals found, however, that Adam's objection regarding the jury instruction at issue made *no reference whatsoever* to the burden of proof, but went to other matters, which was in fact sustained. (Petition, App. 3, p. 23a-24a).

Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). In each of those cases, however, the Rule 51 defect was not timely raised in the Respondent's opposition to the petition for writ of certiorari. In addition, each of those cases dealt with theories of substantive liability rather than with evidentiary burdens of proof. *See City of St. Louis v. Praprotnik, supra,* 108 S.Ct. 915, 99 L.Ed.2d 107 ("This case calls upon us to define the proper legal standard for determining when isolated decisions by municipal officials or employees may expose the municipality itself to liability under 42 U.S.C. § 1983."); *Oklahoma City v. Tuttle, supra,* 471 U.S. at 810 (examining an issue very similar to the issue in *Praprotnik*); *City of Newport v. Facts Concerts, Inc., supra,* 453 U.S. at 249 ("The question presented by this case is whether a municipality may be held liable for punitive damages under § 1983.")

In contrast, the issue presented in the instant case is not whether the defendant could be held liable under an evolving theory of substantive law but, rather, whether the burden of proof within the context of a specific jury instruction was correct. It is important to note that Petitioner has never questioned the validity of the "mixed" or "dual" motive theory in an age discrimination case at any stage of these proceedings. Petitioner's exclusive basis of objection before this Court and the Court of Appeals has been confined to the burden of proof portion of a jury instruction, to which he made no objection at trial.

In sum, granting certiorari in the instant case, where the exclusive basis of review is the allocation of proof as expressed in a jury instruction and where no objection

was made regarding the jury instruction, would effectively emasculate Rule 51. Furthermore, it invites neglect, abuse and waste of judicial resources which Rule 51 was specifically designed to prevent.

2. The Instant Case is An Inappropriate Case for the Court to Review the Issue Presented in the Petition.

The issue presented by Petitioner is whether the burden of proof shifts to the employer in a "mixed" or "dual" motive age discrimination case to prove that the employee would have been discharged regardless of his age. There is no question that the courts of appeals have reached conflicting conclusions on the issue. For the reasons that follow, the instant case presents a particularly inappropriate vehicle for this Court's review of that issue.

The "mixed" or "dual" motive concept was first introduced in employment litigation in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). *Mt. Healthy* discussed the "dual motive" concept in the context of a First Amendment case. This Court has never specifically addressed the "mixed" or "dual" motive issue in the context of a case brought pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) or the Age Discrimination in Employment Act (29 U.S.C. § 621 *et seq.*).

The *Mt. Healthy* analysis involves two separate steps. First, the employee must prove that an unlawful consideration was "a motivating factor" in the employer's discharge decision. *See* 429 U.S. at 287. If, and only if, the employee successfully makes this showing, the burden

then shifts to the employer to show that it would have reached the same decision even in the absence of the unlawful consideration. *Id.*

As the Petitioner correctly observes, the courts of appeals have reached differing conclusions on *Mt. Healthy's* application to ADEA and Title VII cases. (Petition at p. 6-7). The analysis of this issue by the courts of appeals has proceeded along very different lines. Some courts of appeals have held that the *Mt. Healthy* analysis is equivalent to an affirmative defense that the defendant is required to prove in order to escape *liability. See e.g., Spanier v. Morrison's Management Svcs.*, 822 F.2d 975, 979-80 (11th Cir. 1985) (ADEA case); *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 711-13 (6th Cir. 1985) (Title VII case).

Other courts of appeals, however, have held that the *Mt. Healthy* analysis only applies to the *remedial* phase of the case and does not serve to negate a defendant's liability. In other words, the *Mt. Healthy* analysis comes into play *only after* liability is established and the fact finder is considering the appropriate remedy to impose. *See e.g., Bibbs v. Block*, 778 F.2d 1318, 1323-24 (8th Cir. 1985) (Title VII case); *Caviale v. State of Wisconsin*, 744 F.2d 1289, 1296 (7th Cir. 1984) (Title VII case); *Smallwood v. United Air Lines, Inc.*, 728 F.2d 614, 617-19 (4th Cir.) (ADEA case), *cert. denied*, 469 U.S. 832 (1984).

On the other hand, the courts of appeals are compelled to follow this Court's ruling in *United States Postal Bd. of Gov. v. Aikens*, 460 U.S. 711 (1983), that once a "full proof" trial is completed, it is up to the fact finder to decide the "ultimate issue" of whether the employer

intentionally discriminated against the employee. *Id.* at 715. The burden of persuasion remains at all times with the employee. *Id.* at 716. As *Aikens* teaches, it is unnecessary to make the ultimate factual inquiry more difficult by imposing a complicated scheme that shifts the allocation of proof from one party to the other. *Id.* Since the instant case was fully tried on the merits, there was no reason to impose the burden shifting formula asserted by Petitioner.

The question the Court now faces is whether the instant case is the appropriate vehicle to resolve these varying views. In order to answer this question, the disputed jury instruction must be examined within the context of the facts and circumstances existing during the trial. The evidence presented at trial was typical of most employment discrimination actions in that, depending upon which version of facts the fact finder credited, evidence existed that lawful or unlawful factors or both led to Petitioner's discharge. Although it was Respondent's position that Petitioner's age played no role whatsoever in his discharge, Respondent requested the district court to give the jury instruction about which the Petitioner now complains in recognition of the Petitioner's evidence.

The jury instruction at issue goes *only* to the question of *liability* and simply attempts to define the term "motivating factor" as being a factor without which the decision would not have been made. If there is any issue presented by the instruction at all, it is whether its definition of the term "motivating factor" is correct.

In other words, the instruction about which the Petitioner complains is not a *Mt. Healthy* instruction in the classic sense. It did not instruct the jury that if it found that age was a motivating factor in the discharge decision, the burden then shifted to the employer to show that the employee would have been discharged anyway. It merely instructed the jury that if it found that age was one among several factors in the discharge decision, it needed to determine whether the age factor was a "motivating" factor in the decision. The jury was then instructed that a "motivating" factor was one without which the decision would not have been made.

Had the Petitioner objected to the instruction's definition of a "motivating" factor or proposed a classic *Mt. Healthy* instruction, this case would be much different. The fact is, however, that the district court properly placed the burden of proof on the Petitioner in the *liability* phase of the trial and no objections were made to that decision. The Petitioner did not propose a *Mt. Healthy* instruction in either the *liability* or *remedial* stages of the case and thus this Court is not presented with an appropriate setting in which to resolve the burden of proof issue.

The Court of Appeals' decision was manifestly correct. The instant case involved a "full proof" trial wherein, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." (Petition, App. 3 at p. 25a, *quoting Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *see also United States Postal Bd. of Gov. v. Aikens*, 460 U.S. 711 (1983)). Since neither party requested a *Mt. Healthy*

instruction for use in the *remedy* phase of the trial, the Court of Appeals was not confronted with the need to rule on *Mt. Healthy's* application to the remedial stages of the litigation. Furthermore, since *Mt. Healthy's* burden shifting component is not designed for application in the *liability* portion of the trial, the Court of Appeals was correct in ruling that the burden of proof remained with the Petitioner to establish liability. *See Mt. Healthy, supra,* 429 U.S. at 284 ("We are not, however entirely in agreement with [the district court's] manner of reasoning from this finding [that protected speech was a factor in the discharge decision] to the conclusion that [plaintiff] is entitled to reinstatement with backpay.") The Court of Appeals' decision in the instant case is in accord with the Fourth Circuit Court of Appeals' decision in *Smallwood v. United Air Lines, Inc.,* 728 F.2d 614 (4th Cir.), *cert. denied,* 469 U.S. 832 (1984), which involved the same issue (*See* Summary of Issues, *Smallwood v. United Air Lines, Inc.,* 53 U.S.L.W. 3101 (August 14, 1984)), and reached the same conclusion regarding *Mt. Healthy's* burden shifting component.

Moreover, the instant case does not present the Court the opportunity to address a major question presented but not answered by *Mt. Healthy. Mt. Healthy,* perhaps intentionally leaves unanswered the question of precisely what kind of burden shifts to the defendant once the plaintiff produces evidence that an unlawful consideration was a "motivating factor" in the discharge decision. In other words, *Mt. Healthy* provides no guidance as to whether the burden of "production" or the burden of "going forward" shifts to the defendant. This Court has expressly recognized the important distinction between

those phrases. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 n.7 (1983). Since the Petitioner did not propose an instruction that indicated the extent of the burden that shifted to Respondent, the Court is left with only a hypothetical situation on which to base its ruling on this important issue.

Every employment discrimination case is theoretically a "mixed" or "dual" motive case, depending upon the version of the proof the fact finder credits. Imposing a *Mt. Healthy* analysis in which the burden of proof to establish liability is shifted to the defendant, flies in the face of over twenty years of employment discrimination litigation in which this Court has consistently placed the burden on the plaintiff to establish *liability* in Title VII and ADEA cases. It is now inappropriate to change the rules of the game and shift the burden of proof in virtually every employment discrimination case to the defendant to establish that he would have discharged the plaintiff in any event. Furthermore, this is not an appropriate case in which to review the *Mt. Healthy* analysis for use in the *remedial* stage of the case because there is, simply, nothing to review. No instruction was propounded for that aspect of the case by either party. In sum, this case is altogether an inappropriate vehicle for ruling on *Mt. Healthy's* application to age discrimination cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 2, 1988